

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RYAN ALBERT DODD (1),
TERRENCE LEROY HISSONG (2),
PATRICK BRADLEY BRANNAN (3),
STEPHANIE HILTON LIVESEY (4),
JAMES MICHAEL HAY (7),
PERRY MARK HOWARD (8),
MARK NORRIS JOHNSON (9), and
DANIEL PAUL NIEBUHR (10),

Defendants.

No. CR-13-6016-EFS-01
CR-13-6016-EFS-02
CR-13-6016-EFS-03
CR-13-6016-EFS-04
CR-13-6016-EFS-07
CR-13-6016-EFS-08
CR-13-6016-EFS-09
CR-13-6016-EFS-10

**ORDER ENTERING RULINGS FROM JUNE
30, 2014 MOTION HEARING**

A motion hearing occurred in the above-captioned matter on June 30, 2014. Assistant U.S. Attorneys Tyler Tornabene and Sean McLaughlin appeared on behalf of the U.S. Attorney's Office (USAO). Present for the hearing was Defendant Dodd represented by Kevin Curtis, Defendant Hissong represented by Mark Vovos, Defendant Stephanie Livesey represented by Robert Thompson and Peter Connick, Defendant Hay represented by Peter Schweda, Defendant Howard represented by John Metro, Defendant Johnson represented by Julie Twyford, and Defendant Niebuhr represented by Bryan Hershman.¹ Before

¹ Defendant Brannan and counsel Kenneth Therrien were not present. Defendant Baird and counsel John R Crowley were not present.

1 the Court were a number of pretrial motions. After reviewing the
2 pleadings and hearing argument the Court ruled on, or took under
3 advisement, the outstanding motions. This Order memorializes and
4 supplements the Court's oral rulings.

5 **I. USAO'S MOTIONS IN LIMINE**

6 Continued from the June 10, 2014 pretrial conference are the
7 USAO's Motion in Limine for Preliminary Ruling Admitting Exhibits, ECF
8 No. 406, and Motion in Limine to Exclude Defense Witnesses, ECF No.
9 409. The motions were continued to permit counsel an opportunity to
10 confer and reach any possible stipulations. On June 25, 2014 counsel
11 filed a stipulation addressing most of the issues with exhibits. ECF
12 No. 552. At the June 30, 2014 hearing, counsel represented that based
13 upon the stipulations and changes since the June 10, 2014 pretrial
14 conference, the necessary exhibits and witnesses may have changed.
15 Accordingly, at this time, the Court denies the motions, with leave to
16 refile after counsel have conferred and both parties better understand
17 the new dynamics of the cases they plan to present in September.

18 **II. DEFENDANTS' MOTIONS TO DISMISS**

19 Pending before the Court, are three separate motions to dismiss
20 filed by Defendants seeking dismissal of the Superseding Indictment
21 for either *Brady* violation or prosecutorial misconduct. At the June
22 30, 2014 hearing counsel for Defendant Livesey withdrew their motion,
23 ECF No. 506.

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1 **A. Legal Standard**

2 An indictment may be dismissed with prejudice under either of
3 two theories:

4 [First, a] district court may dismiss an indictment on the
5 ground of outrageous government conduct if the conduct
6 amounts to a due process violation. [Second, i]f the
7 conduct does not rise to the level of a due process
8 violation, the court may nonetheless dismiss under its
9 supervisory powers.

10 *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991)
11 (citations omitted). See *United States v. Chapman*, 524 F.3d 1073,
12 1084 (9th Cir. 2008). A district court may exercise its supervisory
13 power "to implement a remedy for the violation of a recognized
14 statutory or constitutional right; to preserve judicial integrity by
15 ensuring that a conviction rests on appropriate considerations validly
16 before a jury; and to deter future illegal conduct." *United States v.*
17 *Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991). However, because
18 "[d]ismissing an indictment with prejudice encroaches on the
19 prosecutor's charging authority," this sanction may be permitted only
20 "in cases of flagrant prosecutorial misconduct." *Id.* at 1091.

21 A *Brady* violation occurs when the government fails to disclose
22 evidence materially favorable to the accused. See *Brady v. Maryland*,
23 373 U.S. 83, 87. The *Brady* duty extends to impeachment evidence as
24 well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667,
25 676 (1985), and *Brady* suppression occurs when the government fails to
26 turn over even evidence that is "known only to police investigators
and not to the prosecutor," *Kyles v. Whitley*, 514 U.S. 419, 438
(1995). "Such evidence is material 'if there is a reasonable

1 probability that, had the evidence been disclosed to the defense, the
2 result of the proceeding would have been different.'" *Strickler v.*
3 *Greene*, 527 U.S. 263, 280 (1999).

4 **B. Defendants' Motion to Dismiss Indictment, ECF No. 498**

5 Defendants Dodd, Hissong, Livesey, Hay, Howard, and Johnson,
6 joined by Defendant Brannan, seek dismissal of the indictment for
7 prosecutorial misconduct for failing to disclose *Brady* impeachment
8 material relating to the DOE-OIG investigation in 2006 Audit Report on
9 the "Performance-Based Contract Incentives at the Hanford Site"
10 (Report). In the alternative, Defendants request disclosure of all
11 documents, audits, work papers, and other related materials to the
12 2006 investigation. By the June 30, 2014 hearing, defense counsel had
13 already received the 2006 audit, which had always been publicly
14 available. ECF No. 532-1.

15 The Court does not find any *Brady* violation as the publicly
16 available 2006 audit is not material to the alleged time card fraud
17 and conspiracy. In pertinent part, the Report concluded:

18 Although the ORP and Richland intended for their
19 performance-based contract incentives to be result-
20 oriented, in certain cases, the work assigned to site
21 contractors by these offices was not realistic or
22 achievable. As a result, the Department's limited
23 financial resources were applied to incentivize end-states
24 that were not readily attainable; and, fees were paid for
25 work that could not be completed.

26 ECF No. 532-1.

It did not address the culture at the Hanford site, time
reporting practices, or the practice of conducting eight-hour overtime
callouts. Additionally, as the report, already provided to

1 Defendants, is not material, there is no *Brady* obligation to produce
2 the underlying working papers from the audit. The USAO did not engage
3 in misconduct let alone misconduct justifying dismissal of the
4 Superseding Indictment. Accordingly, the Court denies the motion.

5 **C. Defendants' Motion to Dismiss Indictment or In Alternative**
6 **Compel Production of Brady Material, ECF No. 501**

7 Defendants Dodd, Hissong, Brannan, Livesey, Hay, Howard, and
8 Johnson, joined by Defendant Niebuhr, seek dismissal of the indictment
9 for prosecutorial misconduct by failing to disclose *Brady* material,
10 intentionally utilizing a parallel civil prosecution to influence
11 government witnesses, and distorting the fact finding process to the
12 prejudice of Defendants. Alternatively, Defendants request that the
13 USAO immediately disclose all contacts, written or oral, made with any
14 potential witness in relation to the threat of civil fines and
15 penalties.

16 First, the Court does not find any offensive or outrageous
17 conduct on the part of the USAO let alone misconduct that would rise
18 to the level justifying dismissal of the Superseding Indictment. The
19 USAO has engaged in the use of simultaneous criminal and civil
20 investigations. However, courts in reviewing the simultaneous
21 investigations have been concerned only when material
22 misrepresentations were made about the nature of an investigation or
23 potential defendants were misled to incriminate themselves. See
24 *United States v. Stringer*, 535 F.3d 929 (9th Cir. 2008); *United States*
25 *v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala 2005). Here, such conduct
26 is not at issue. Instead, Defendants primarily challenge the

1 communication by the USAO with prospective government witnesses
2 regarding civil liability. There is nothing improper about the nature
3 of the USAO conduct in pursuing its civil and criminal enforcement
4 obligations. The resolution of potential liabilities of such
5 witnesses might result in the testimony of knowledgeable witnesses who
6 might otherwise be privileged. Accordingly, on the record before it,
7 the Court finds no outrageous conduct which could justify dismissal.
8 However, this is not to say that, as discussed in *United States v.*
9 *Juan*, 704 F.3d 1137, 1142 (9th Cir. 2013), the government may lead a
10 witness to materially change their testimony. If such a substantial
11 interference was to be shown by a preponderance of the evidence that
12 would be another matter. Here, there is no evidence any witness has
13 been compelled to change their testimony nor that they have changed
14 any prior statement. Accordingly, the Court denies the motion as to
15 dismissal of the indictment.

16 Next, as to the ongoing negotiations with Mr. Chapman, the
17 parties agreed that Defendants have been provided all the write-ups
18 and emails related to Mr. Chapman's negotiations, as well as, drafts
19 of proposed agreements. However, the final agreement does not yet
20 exist. The USAO has agreed it will be produced once it is finalized.
21 Accordingly, Defendants' motion is granted as to the production of any
22 agreements with Mr. Chapman.

23 Finally, as to the production of any deals reached with other
24 witnesses, Defendants seek production of any agreements, deals, and
25 any offers or demands to make an agreement or deal. In *Phillips v.*
26 *Ornoski*, 673 F.3d 1168, 1187 (9th Cir. 2012), the Ninth Circuit found

1 a *Brady* violation arising out of the failure of a plea offer, made to
2 a witness's attorney and allegedly communicated to the witness even
3 though it was not accepted. The Ninth Circuit found that the
4 existence of that offer was "indisputably evidence 'favorable to the
5 accused . . . because it is impeaching,' and was clearly subject to
6 the duty of disclosure established in *Brady*." *Id.* at 1188.
7 Accordingly, here the Court finds that any offer or target letters
8 offering to resolve liability, even if not accepted, made to a
9 potential witness who is expected to testify, must be disclosed.

10 **III. CONCLUSION**

11 Accordingly, **IT IS HEREBY ORDERED:**

- 12 1. USAO's Motion in Limine to Exclude Defense Witnesses, **ECF**
13 **No. 409**, and Motion in Limine for Preliminary Ruling
14 Admitting Exhibits, **ECF No. 406**, are **DENIED WITH LEAVE TO**
15 **RENEW.**
- 16 2. Defendants' Motion to Dismiss Indictment, **ECF No. 498**, is
17 **DENIED.**
- 18 3. Defendants' Motion to Dismiss Indictment or Alternatively
19 Compel Production of *Brady* Material, **ECF No. 501**, is
20 **GRANTED IN PART** (production of the agreement with Mr.
21 Chapman and any other witness who receives or is offered a
22 deal and whom the USAO expects to call as a witness) **AND**
23 **DENIED IN PART** (dismissal of indictment).
- 24 4. Defendant Livesey's Motion to Dismiss for Failure to
25 Provide *Brady* Material, **ECF No. 506**, is **WITHDRAWN.**

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IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 7th day of July 2014.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge